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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK and THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS IN OPPOSITION

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STATUTES

Act of December 24, 1969, Pub.L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4, 85 Stat. 775 ..... 2, 3, 4, 5

Laws of New York, 1963, ch.257, *as amended by* Laws of New York, 1970, ch.166, N.Y. Unconsol. Laws § 9447 (McKinney 1974) 2, 4, 6, 7

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Opinions Below

The opinions below are accurately set forth in the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Statutes Involved

The statutes involved are adequately set forth in the petition and its appendices F, G and H.

Statement of the Case

The statement of the case in the petition is for the most part correct. There are, however, a few minor inaccuracies which we set forth at this point.

At page 5 of the petition, it is stated that "[n]o such affirmative action had occurred * * *". This, of course, is a legal conclusion contrary to what the Court below found.

On the same page, petitioners state that the Court below held the tax in question to be lawfully imposed on national banks for the period prior to January 1, 1973. Actually, that Court validated the tax only for periods subsequent to May 31, 1970.

Questions Presented

Petitioners' statements of the subsidiary questions, while adequate for an understanding of the case, are slightly incomplete. We would put the question involved in the following different form:

(1) Whether the enactment of chapter 166 of the New York Laws of 1970 constituted the "affirmative action of the State legislature" required by § 3 of Pub. L. No. 91-156, the saving provision of that law, when there was no specific or express mention of national banks in that chapter.

(2) We do not brief the question of whether the tax involved is one on tangible personal property because

although the Court below denominated this issue as "at least equally dispositive" (Pet. A., B-6) it is our feeling that it is a secondary issue none the less.

Constitutional and Statutory Background

On June 17, 1968 this Court handed down its opinion in *Agricultural Bank* v. *Tax Comm'n.*, 392 U.S. 339 (1968). That case held that a state could not impose taxes on national banks other than those authorized specifically by United States Revised Statutes § 5219 (U.S.C. § 548).

After this Court's decisions in the *Agricultural Bank* case, *supra*, and in the case of *Dickinson* v. *First National Bank of Homestead*, 393 U.S. 409 (1969), Congress enacted P.L. 91-156, 83 Stat. 434, to amend § 5219 of the Revised Statutes effective December 24, 1969. It is this law as amended by P.L. 92-213, § 4, 85 Stat. 775, with which we are dealing. The Congressional legislation, among other things, permitted certain non-discriminatory taxes to be laid by the states on national banks and in its § 2, permanently amended Revised Statutes § 5219 (12 U.S.C. § 548) effective January 1, 1973, to permit taxation of national banks as if they were organized and existed under the laws of the state or jurisdiction within which the bank's principal office was located. However, during the period prior to January 1, 1973 the federal legislation prohibited (with exceptions not here relevant) the imposition of a tax on a bank:

> "by or under the authority of any State legislation *in effect prior to the enactment of this act* unless
>
> • • • •
>
> 2. The imposition of the tax is authorized by *affirmative action of the state legislature* after enactment of this act." (Italics supplied.)

On April 22, 1970, approximately four months after the enactment of the federal legislation (December 24, 1969), chapter 166 of the laws of New York for that year became effective. Its enactment by the New York State Legislature authorized specifically the imposition of commercial occupancy taxes for the period beginning after May 31, 1970 at higher rates than those previously in effect. It did not expressly or explicitly state that national banks would be subject to the taxes authorized. However, it incorporated and reenacted the language of the section of the original enabling act, chapter 257 of the laws of 1963, which granted the power to impose an occupancy tax. That act, set forth in subdivision 7 of its section 1, four categories of exemption which did not include national banking associations. Indeed, it exempted "[t]he United States of America, only insofar as it is immune from taxation".

Thus, on its face, the original enabling act purported to authorize a tax on national banks. The action of the legislature in 1970 continued and reiterated the enabling legislation without express or explicit mention of national banks, nor did the local law imposing the tax, No. 20 of 1970 make any explicit or express mention of national banks. Both pieces of legislation left undisturbed similar exemption provisions that contained no exemption of national banks.

ARGUMENT

(I)

The statute involved is no longer in effect and the case does not present a problem of wide applicability.

Although the statute we are dealing with (Section 3 of Pub. L. No. 91-156, as amended by Pub. L. 92-213) is still on the books, its vitality and force came to an end on

December 31, 1972. As a result, it is in the same class as is a repealed statute.

It is unlikely in the extreme that another case involving the unique background of this case will arise. Certainly, there is no hint of similar litigation in the annotations to 12 U.S.C.A. § 548.

Petitioners' speculation (Pet. p. 7) about the 13 other national banks with offices in New York City "whose liability for the Commercial Rent Tax may still be open" has no foundation in fact. Indeed, all that petitioners say is that the liability of those banks may still be open. When petitioners apply this kind of reasoning to the 4722 national banks in the country, they really stretch one's credulity.

In *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 79 (1955), this Court, having granted a writ of certiorari, and heard arguments on the case, dismissed the petition when a new state statute had the effect of insuring that the question involved would not recur.

The provision of the statute involved in this case (§ 3 of Pub. L. No. 91-156) lost its force on January 1, 1973 when section 2 of Pub. L. No. 91-156 took effect (A.G.-3, Pet.).

Even though the granting or denying of an application for a writ does not necessarily depend upon the court's action in similar cases, the fact is that the present case will add very little to the fabric of the law. The saving provision of Pub. L. 91-156, section 3, as amended by Pub. L. 92-213, had a life of a little over three years.

(II)

The enactment of chapter 166 of the laws of 1970 by the state legislature, constituted "affirmative action of the state legislature" within the meaning of paragraph (2) of subsection (a) of section 3 of Public Law 91-156, 83 Stat. 434, which required authorization for the tax by that affirmative action.

The taxpayers have confused the word "affirmative" with the words "explicit", "express", "specific" or "conscious". The word "affirmative" means none of these four things. Indeed, the legislative intent is expressed somewhat ambiguously. Neither did the federal statute mean "manifested in an unmistakable manner"; nor does it mean "clear on the face of the legislation". And it does not require that the action of the legislature be not only "affirmative" but also "positive", although that word has approximately the same meaning as "affirmative". The word "affirmative", according to the dictionary, means giving affirmation or assent, and not negative. Webster, New International Dictionary 2d Ed., p. 43.

The fact that the law brought about meaningful increases in the rate of tax, in the words of the Court below, makes "it * * * difficult to perceive how they (legislative decisions) can be regarded as anything but permeated with 'action' ".

Since the statute which authorized the local law involved here, on its face clearly encompassed national banks within its coverage, there was no reason at the time to reenact the authorizing section of the earlier 1963 enabling act in any other way, in order to bring national banks within the ambit of its language. They were already there. There was no pre-existing exemption of national banks to repeal. Congress had done that. All that was required was affirmative action authorizing imposition of the tax. The 1970 legislation was an affirmative act. It

was unnecessary to insert a specific provision calling for the tax to apply to national banks.

When the legislature made the change by enacting chapter 166 of the Laws of 1970, it purported to amend the entire text of subdivision (1) of section 1 of the original enabling act. The new material in the law related to tax periods beginning after May 31, 1970 and authorized the imposition of tax for those periods, denominating them as "such taxes", an obvious reference to the more fully described tax in the language which was reenacted. It is clear that for the tax period in question, a new tax at the higher rate was authorized and national banks were not excluded or exempted from that tax.

Petitioners state several times in their petition that chapter 166 of the Laws of 1970 effected a mere rate change (Pet. 11 and 12). They overlook the fact that section 2 of chapter 166 repealed another provision in the act (H-8).*

(III)

Should this Court reverse the judgment below we reserve the right to request a remand rather than an outright reversal.

In the Courts below we argued that the "affirmative action of the State legislature" was not required to validate the tax in issue. This argument is bottomed on the rule of statutory construction to which the Court of Appeals alluded in its opinion (Pets', A., B-5, B-6)—a rule that views a statutory amendment to an earlier statute as a republication of the statute in the manner in which a codicil republishes a will. When the Court of Appeals found that the 1970 law, which republished the 1963 law,

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* The repealed subdivision was restored in part by New York Laws of 1977, chapter 708.

constituted affirmative action, there was no need to pay any heed to the other argument. We mention this here so that, in the event of a reversal by this Court, it will remand the matter for resolution of this point, which is a matter of state law, i.e., the effect of the republication of a law when amending it. See *Spector Motor Co.* v. *McLaughlin,* 323 U.S. 101 (1944), *Greyhound Lines* v. *Mealey,* 334 U.S. 653 (1948), *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: June 15, 1978.

Respectfully submitted,

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